



REPUBLIC OF KENYA



Agriculture and Food Authority v County Government of Kisii & 4 others (Environment & Land Case 943 of 2016) [2023] KEELC 853 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 943 OF 2016
JM ONYANGO, J
FEBRUARY 16, 2023**

BETWEEN

AGRICULTURE AND FOOD AUTHORITY PLAINTIFF

AND

COUNTY GOVERNMENT OF KISII 1ST DEFENDANT

KISII UNIVERSITY COLLEGE 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

THE COUNTY LAND REGISTRAR, KISII 5TH DEFENDANT

RULING

1. By a Complaint dated 24th July, 2012 and amended on the 23rd May, 2016, the Pyrethrum Board of Kenya which is the predecessor of the Agriculture and Food Authority filed suit against the Defendants alleging that the defendants had fraudulently caused the 1st Defendant to be registered as the owner of land parcel number Nyaribari/keumbu/1028 measuring approximately 61.0 acres and subsequently leased the same to the 2nd Defendant while being aware that it belonged to the Plaintiff.
2. The Plaintiff seeks *inter alia*, cancellation of the 1st Defendant's title and an order of vacant possession against the 2nd defendant as well as registration of the plaintiff as the owner of the suit property.
3. The 1st and 2nd Defendants filed their statements of Defence denying the Plaintiff's claim against each of them. In its Defence the 2nd Defendant stated that the Plaintiff had no *locus standi* to file the suit and that the 2nd defendant reserved the right to raise a Preliminary Objection in that regard. Additionally, the 2nd Defendant averred that the suit was barred by the *Limitation of Actions Act* (Cap22 of the Laws of Kenya).



4. When the matter came up for hearing on the 28th March, 2022, counsel for the 2nd and 1st Defendants raised the Preliminary Objection mentioned in the 2nd Defendant's and 1st Defendants' Defences. On his part, counsel for the 3rd -5th defendants was of the view that the matter could be resolved under the Inter -governmental Relations Act as the dispute involves institutions at the two levels of government.
5. The court directed that the Preliminary objections be heard first and that the same be canvassed by way of written submissions. The court further directed that the 3rd-5th Defendants file and serve their Notice of Preliminary objection and that all the Preliminary Objections be canvassed by way of written submissions.

1st Defendant's Submissions

6. Learned counsel for the 1st Defendant referred to paragraph 3 of the 1st Defendant's Defence to the Further Amended Plaintiff which reads as follows:

Paragraph 3

“The 1st Defendant shall contend at the hearing hereof that the plaintiff herein raises no reasonable cause of action and/or triable issue and hence the same should be struck out and/or dismissed with costs on the grounds *inter alia* that:-

- a. The suit herein is a nullity as the same is statutorily time barred under sections 3 and 7 of the *Limitation of Actions Act* Cap22 of the Laws of Kenya
- b. It is scandalous, frivolous and vexatious
- c. It is otherwise an abuse of the process of the court.

Alternatively, the plaintiff's claim against the defendant has been defeated by the doctrine of laches and acquiescence”

7. He submitted that it was not in dispute that the 1st defendant is the registered proprietor of L.R No. Nyaribari Keumbu 1028 having acquired it on a first registration on 16th March, and the plaintiff's failure to respond to this assertion in the 1st Defendant's Defence to Further Amended Plaintiff filed on 25th July 2016, the Plaintiff was deemed to have admitted the same in accordance with Order 2 rule 1 of the *Civil Procedure Rules*. He made reference to correspondence which was exchanged between the 1st Defendant and the plaintiff in 1994 and 1996 to the effect that Gusii County Council had the land which the plaintiff had been using earmarked for other developments. He cited the case of *Synergy Credit Limited v Oxyplus International Limited & 2 Others* (2021)eKLR for the proposition that where admission of facts has been made by either of the parties in pleadings whether orally or in writing, or otherwise, the judgment to the extent of the admission can be granted on the application or as the court may think just.
8. With regard to the suit being time barred, he submitted that the plaintiff ought to have filed suit to recover the land within 12 years from 1999 when it started asserting its right to the land but instead it had filed suit outside the limitation period of 12 years.
9. He contended that the plaintiff could not claim an overriding interest in the suit property as it had applied to be allocated an alternative piece of land.



2nd Defendant's Submissions

10. On his part learned counsel for the 2nd defendant submitted on two issues; *locus standi* and the limitation which were raised in paragraphs 19 and 20 of their Defence.
11. With regard to *locus standi*, he submitted that the Plaintiff lacked the *locus standi* to institute this suit as it claims to have occupied the suit property following a donation by the area chief Musa Nyandusi who had no capacity to allot land to anyone. He further adds that the suit property was registered in the name of the 1st defendant as the absolute owner in 1961 and the Plaintiff has no claim to it.
12. On the issue of limitation, counsel submitted that the plaintiff failed to raise his claim to the suit property within the limitation period of 12 years and his case which was raised after a period of 47 years is time-barred. He further submitted that that in terms of section 26(1) of the [Land Registration Act 2012](#), the 1st defendant's title is conclusive evidence that he is the owner of the suit property and it can only be impeached on grounds of fraud or misrepresentation or if it was acquired illegally, un-procedurally or through a corrupt scheme. He relied on the case of [Susan Wanjiru Waweru v Musa Kimengich](#) (2019) eKLR.

3rd, 4th and 5th Defendants' Submissions

13. Learned counsel for the 3rd, 4th and 5th Defendants submitted on the Notice of Preliminary Objection filed by the 3rd-5th Defendants on the 20th May, 2022. In the said Preliminary objection, they raised the point that this court lacks jurisdiction to hear and determine this suit in view of the express provisions of sections 30,31,32, 33, 34 and 35 of the [Inter-Governmental Relations Act](#) No. 2 of 2012 as well as Article 6(2) and 189(3) and (4) of the [Constitution](#) of Kenya. They also stated that the suit is premature, incompetent, frivolous and vexatious.
14. Citing the case of [The Owners of Motor Vessel Lilian S v Caltex Kenya Limited](#) (1989) KLR, counsel submitted that the question of jurisdiction ought to be raised at the earliest opportunity so that if the court forms the opinion that it has no jurisdiction, it should down its tools.
15. It was his submission that while this court has the jurisdiction to deal with land matters under Article 162(2) of the [Constitution](#), there is a claw-back provision under Article 6(2) and 189(3) of the [Constitution](#) as well as sections 30,31,32,33,34 and 35 of the [Inter-Governmental Relations Act](#) No. 2 of 2012 (IGRA). He cited [Halsbury's Laws of England](#) Vol10, Par 723 which provides that;

“Where a Tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court’s jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner”
16. He cited the cases of [Narok County Council v Transmara County Council](#) (2000) 1E.A 161, [Eliud Wafula Maelo v Ministry of Agriculture & 3 Others](#) (2016)eKLR and [Isiolo County Assembly Service Board & Another v The Principal Secretary \(Devolution\) Ministry of Devolution & Planning & Another](#) (2016) eKLR to buttress his point.
17. It was his contention that pursuant to the aforesaid provisions of the [Constitution](#) and the [IGRA](#), the court lacks the jurisdiction to hear and determine the suit herein. He submitted that the aim of [IGRA](#) is to establish a framework for consultation and cooperation between the national and county governments and to establish mechanisms for the resolution of inter-governmental disputes pursuant



to Articles 6 and 189 of the Constitution and for connected purposes. He elaborated the provisions of the said Act and the Constitution and submitted that in view of the said provisions of the law the jurisdiction of the court is limited until aggrieved parties exhaust all available dispute resolution mechanisms. He contended that by initiating these proceedings before exhausting the mechanisms established under the law, the plaintiff had jumped the gun and this amounted to abuse of the court process.

18. Counsel further submitted that the plaintiff's suit was incompetent as the verifying affidavit had been sworn by the General Manager, Technical services, a position that did not exist under the Agriculture and Food Authority Act.

Plaintiff's Submissions

19. Learned counsel for the Plaintiff submitted that the 1st defendant invoked Order 2 Rule 15(1) (a), (b) and (d) of the Civil Procedure Rules while seeking to strike out the Plaintiff's suit. The grounds raised in the 1st Defendant's objection were that the Plaintiff raises no reasonable cause of action or triable issues and hence the same should be struck out. He argued that Order 2 rule 15(2) provides that no evidence shall be admissible on an application under rule 1(a). He submitted that the 1st defendant sought to rely on the ground that the Plaintiff had admitted matters pleaded in paragraph 5(iv) of the 1st Defendant's Defence to the Further Amended Plaintiff to the effect that he had failed to pay rent thereby acknowledging that the suit property belonged to the 1st Defendant. He contended that this was not true as these allegations were traversed in paragraphs 5 to 8 of the 1st defendant's defence to Further Amended Plaintiff. He urged the court to disregard the documents attached to the 1st Defendant's submissions as these could only be admitted during the hearing.
20. On the question of limitation, he submitted that whereas section 7 of the Limitation of Actions Act provides that a right of action to recover land must be brought within 12 years the plaintiff's claim fell within section 9 which provides that where the person bringing an action to recover land has been in possession of the land and he is dispossessed of the same, the right of action accrues on the date of dispossession.

Issues for Determination

- i. Whether the court has jurisdiction to hear and determine this suit.
- ii. Whether the plaintiff has locus standi to institute this suit.
- iii. Whether the suit is time-barred.
- iv. Whether the suit is incompetent

Analysis and Determination

21. In the case of R V Karisa Chengo and 2 Others (2017) eKLR the Supreme Court of Kenya emphasized the issue of jurisdiction and observed that in almost all legal systems of the world, jurisdiction has emerged as a critical concept in litigation. Citing John Beecroft Saunders in his treatise Words and Phrases legally defined Vol 3 at P. 113 jurisdiction is defined as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter or Commission under which the court is constituted and may be extended or limited by like means....Where a court



takes upon itself to exercise a jurisdiction which it does not possess, its decisions amount to nothing”

22. To emphasize the significance of jurisdiction the Court of Appeal in the case of *The Owners of Motor Vessel Lillian “S” V Caltex Oil Kenya Limited* 1989 KLR 1653 held as follows:

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”

In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another* the Court stated;

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise the jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

23. Although I agree with counsel for the 3rd, 4th and 5th Defendants that the *Inter-governmental Relations Act* provides a framework for resolving disputes between the two levels of government using Alternative Dispute resolution mechanisms before approaching the courts, I note that the dispute herein predates the said *Act* and it is therefore inapplicable.

24. Section 1 of the *Intergovernmental Relations Act* provides as follows:

Short title and commencement;

S.1 This *Act* may be cited as the *Intergovernmental Relations Act*, 2012 and shall come into operation upon the final announcement of the results of the first elections under the *Constitution*.

25. The first elections under the 2010 *Constitution* were conducted in March 2013 while this suit was filed in 2012. Although alternative dispute resolution has now been embraced by the courts in resolving civil disputes, it does not take away the jurisdiction of the court.

26. I will now move on to determine whether the plaintiff has the locus standi to institute this suit. Locus standi connotes the right to bring an action. In the case of *Law Society of Kenya v Commissioner of Lands and 2 Others* (2001) eKLR the court held that a person must have sufficiency of interest to sustain his standing in a court of law. Counsel for the 2nd Defendant submitted that the plaintiff has no capacity to bring the instant suit as it has no proprietary interest in the suit property. It was his contention that the 1st Defendant was registered as the proprietor of the suit property way back in 1965 while the plaintiff was already in possession thereof and since the said registration was a first registration, the plaintiff cannot challenge it. He further submits that the plaintiff’s claim that he was allocated the land by chief Musa Nyandusi in 1961 does not hold any water as the said chief had no power to allocate land.

27. On his part, counsel for the plaintiff submitted that the plaintiff is a state corporation established under the *Agriculture and Food Authority Act* and under section 3 of the *State Corporations Act*, it has the



capacity to own movable and immovable property and to sue and be sued. The plaintiff claims that it had been in possession of the suit property for a period of almost 50 years before it was unlawfully evicted. It will therefore be upon the plaintiff to prove its case.

28. I agree with counsel for the plaintiff that the plaintiff has the legal capacity to sue in accordance with the *State Corporations Act*. The issue of whether or not the plaintiff has any right to the suit property should not be confused with the issue of *locus standi*.
29. The third issue for determination is whether the Plaintiff's suit is time-barred. Learned counsel for the 1st Defendant contended that the plaintiff ought to have filed suit in 1999 when the 1st defendant alleged that the suit property belonged to it. He relied on section 7 of the *Limitation of Actions Act* which provides as follows:

S. 7 An action may not be brought by any person to recover land after the end of twelve years from the date on which the right accrued to him or if it accrued to some person through whom he claims to that person.
30. On the other hand, learned counsel for the plaintiff submitted that section 7 as read with section 9 of the *Limitation of Actions Act* protects the rights of the plaintiff. He argued that whereas 7 provides that suit for recovery of land be filed within 12 years, Section 9 provides that where a person has been in possession of land and seeks to recover possession thereof, the cause of action accrues on the date of dispossession. The said section provides as follows:

S.9 Where the person bringing an action to recover land or some person through whom he claims has been in possession of the land and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of dispossession or discontinuance.
31. Counsel contended that the Plaintiff had been in possession of the suit property since 1961 and that it had been dispossessed by the 1st Defendant in 2012. It is therefore his contention that the Plaintiff's suit which was filed five months after dispossession is not time-barred as the cause of action arose after it was dispossessed. He contends that it is necessary for the case to proceed to full trial so that the 1st Defendant can explain why it fraudulently had the land registered in its name yet it was aware of the plaintiff's overriding interest therein.
32. A reading of the Amended plaint reveals that the plaintiff's claim though for recovery of land, falls within the provisions of Section 9 of the *Limitation of Actions Act* as the plaintiff claims that it was dispossessed after being in possession for a period of more than 40 years. Additionally, the plaintiff claims that the 1st Defendant fraudulently had the suit property registered in its name. Under Section 4 of the *Limitation of Actions Act*, the limitation period for torts is 3 years. However, the proviso to Section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. At paragraph 5C of the Amended Plaint, the plaintiff alleges that it only discovered that the 1st Defendant was registered as the owner of the suit property when it conducted an official search in 2011. On the face of it therefore, it would appear that the claim for fraud is not time-barred.
33. Be that as it may, the Court of Appeal case of, *Peter Wekesa-vs-Peter Wangusi Wasike*, Court of Appeal at Eldoret, Civil Appeal No.62 of 2003(unreported), cited in the case of *Justus Tureti Obara v Peter Koipeitai Nengisoi* (2014) eKLR the court stated that, in land matters, caution must be exercised to avoid determination of disputes on pure technicalities.



34. The third issue I have to determine is whether the suit is incompetent.
35. In the instant suit the 1st defendant sought to rely on the ground that the Plaintiff had admitted matters pleaded in paragraph 5(iv) of the 1st Defendant's Defence to the Further Amended Plaint to the effect that he had failed to pay rent thereby acknowledging that the suit property belonged to the 1st Defendant counsel for the 1st Defendant annexed letters to his submissions to the effect that the plaintiff acknowledged that the suit property belonged to the Plaintiff and that he was aware that he was required to pay rent.
36. On the other hand, the plaintiff maintained that he traversed the averments in paragraph 5(iv) of the Plaint in the paragraphs 5-8 of the 1st Defendant's Defence to the Further Amended Plaint. In considering a preliminary objection, the court is only required to look at the pleadings. If any matter has to be ascertained by way of documents, then it does not qualify as a preliminary objection See *Mukisa Biscuits v West End Distributors Ltd* (1969) E.A 696.
37. Having looked at the pleadings, I am not persuaded that the Plaint raises no reasonable cause of action nor is it so frivolous that it ought to be struck out. I am guided by the principles in respect of applications for striking out of pleadings set out in *D. T Dobie & Company (Kenya Ltd Vs Muchina* 1982 KLR 1 in which Madan J (as he then was stated as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way,” Sellers LJ. (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind to summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it.”

38. The upshot is that the Preliminary Objections raised by the 1st and 2nd Defendants and the one raised by the 3rd -5th Defendants are not sustainable. The same are dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 16TH DAY OF FEBRUARY, 2023.

.....

J. M ONYANGO

JUDGE



In the presence of;

Miss Kabalika for Mr.Orefe for the Plaintiff

Miss Cherotich for Miss Odwa for the 2nd Defendant

No appearance for the 1st, 3rd, 4th and 5th Defendants

Court Assistant: Mr. Oniala

